NO. 22112

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAYMOND JOHN WAGNER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

STATEMENT OF JURISDICTION

Appellant was indicted by the Federal Grand Jury for the Southern District of California, Central Division, for a violation of Title 18, United States Code, Section 2114, armed robbery of a Postmaster (Wagner v. United States, 264 F. 2d 524 [9th Cir. 1959]). Following a jury trial, the appellant and his two co-defendants were sentenced to the custody of the Attorney General for twenty-five years (Wagner, id.). An appeal was taken from the above conviction and the conviction affirmed (Wagner, id.).

In 1965 appellant filed a motion pursuant to §2255, which

motion was denied, and affirmed on appeal (Wagner v. United States, 374 F.2d 86). Appellant filed the subject §2255 motion on March 29, 1967 [C.T. 2]. 1/ Following an Order, filed April 21, 1967 [C.T. 15], the appellant filed an Amended Petition pursuant to Section 2255 of Title 28, U.S.C. [Supplemental Clerk's Transcript]. On May 23, 1967, there was filed an Order Dismissing Petition pursuant to Section 2255, Title 28, U.S.C. [C.T. 17].

A Notice of Appeal was filed June 20, 1967 [C.T. 20].

The District Court had jurisdiction under the provisions of Title 18, U.S.C. Sections 2114 and 3231, and Title 28, U.S.C. Section 2255.

This Court has jurisdiction pursuant to Title 28, U.S.C. Sections 1291, 1294 and 2255.

II

STATUTE INVOLVED

Appellant's motion, the denial of which is the basis of the instant appeal, was brought under the provisions of Title 28, U.S.C. Section 2255, which, in pertinent part, provides:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws

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1/ C.T. refers to Clerk's Transcript.

of the United States . . ., or is otherwise subject to collateral attack, may move the Court which imposed the sentence to vacate, set aside or correct the sentence. . . .

"An appeal may be taken to the Court of Appeals from the order entered on the motion as from a final judgment or application for a Writ of Habeas Corpus. . . ."

III

STATEMENT OF THE CASE

A. Questions Presented

1. Whether a hearing is required when only bald conclusions are made in a §2255 motion.

2. Whether appellant may raise the same ground urged in his direct appeal from conviction, and also rejected in a previous §2255 appeal.

3. Whether there was an ex parte hearing in this matter.

B. Statement of Facts

On the afternoon of December 19, 1955, at about the hour of 2:30 P. M. Assistant Postmaster Bonner and Postmaster Martin left the Post Office at Bellflower to deposit postal funds and checks

in a bank at Bellflower, California [R. T. 104]. 2/ They proceeded from the Post Office in a Pontiac station wagon driven by Postmaster Martin. Martin was armed [R. T. 105]. They parked the station wagon in a parking lot to the rear of the bank. Immediately upon stopping the auto and when they, Bonner and Martin, started to get out of the car they were accosted: "a man accosted Martin with a gun . . ." [R. T. 106-107]. Bonner testified that he could not identify the man who accosted Martin with a gun [R. T. 107]. Postmaster Martin identified such person as co-defendant Vandergrift [R. T. 254-255]. Martin testified that this person, Vandergrift, " . . . approached on my side and stuck a gun in my side and demanded my gun" [R. T. 254]. That this person, Vandergrift, was also reaching in on the right side of Martin's coat trying to get his, Martin's gun [R. T. 255]. "So (Martin) I reached into the left to give him my gun, and at that time he pushed the gun into my ribs and told me to keep my hand out if I didn't want to get shot" [R. T. 255]. Martin testified that he was apprehensive of his life and that he felt his assailant meant business [R. T. 255]. That his shirt had a rip in it where the gun had jammed into his ribs [R. T. 256].

Bonner testified that the man on his side of the auto also had a gun [R. T. 107]. That this person demanded the money. This person, Bonner identified as the appellant Wagner [R. T. 108]. Bonner testified that he was certainly apprehensive of his life and was in fear when the gun was pointed at him and that he believed

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2/ R. T. refers to Reporter's Transcript.

the men meant business [R. T. 109]. Bonner testified that the "man", "Wagner", took the money, that the two of them went to the rear of their car and then later came in front of their car, crossed the street and got in the get-away car that was double parked across the street on Maple Street, headed east [R. T. 109]. This car was described as a dirty-colored Oldsmobile. Assistant Postmaster Bonner stated he saw the driver of the get-away car very clearly, whom he identified as the co-defendant Cambiano [R. T. 110]. Postmaster Martin likewise identified Cambiano as the driver of the get-away car [R. T. 259-260].

Witness Bonner stated that there was a "7-UP" truck double parked on the street at the time they [he and Martin] went into the parking lot [R. T. 149]. That he later talked to the driver of this truck [R. T. 150]. That the "7-UP" man gave to him, Bonner, the license number of the get-away car [R. T. 178].

The witness Robert Hunt stated that he was an insurance agent. That on December 19, 1955, he had parked his automobile on Maple Street [R. T. 226]. This car was parked on the opposite side of the street from Mr. Hunt's office. That he had gone to his car that afternoon and attempted to start his car when a man with a money sack or a brown canvas bag in one hand and a gun in the other appeared to the right of his car [R. T. 227]. Witness Hunt identified this person as the defendant Vandergrift [R. T. 228]. That this person was close to him, about four or five feet -- that he had blue eyes [R. T. 229]. Hunt described the get-away car as a " '50, '51, oxidized, badly oxidized Oldsmobile, four-door sedan"

[R. T. 229]. Hunt observed the driver of this car and identified him as defendant Cambiano [R. T. 230]. Upon cross-examination, he again identified Cambiano and gave a description of him as he remembered him [R. T. 242]. The witness Hunt conceded that his identification of Vandergrift was "doubtful" [R. T. 238]. Hunt made no attempt to identify appellant Wagner; he testified: "Another man crossed behind the first man, which I did not get a good look at" [R. T. 230].

Postmaster Martin identified Vandergrift as the person who approached his side of the car " . . . and stuck a gun in my side and demanded my gun" [R. T. 254-255]. Martin also identified Wagner as the person he observed on the opposite side of the car. " . . . I glanced over to my Assistant Postmaster and I noticed that another man was over there with a gun at his head" [R. T. 257]. That this person did not then have a mask on [R. T. 257]. Witness Bonner had testified that the mask over a part of Wagner's face had slipped down [R. T. 140]. Witness Martin also identified Cambiano as the driver of the car that the robbers used to make their get-away [R. T. 260].

IV

ARGUMENT

A. NO HEARING IS REQUIRED WHEN A PETITION MERELY CONTAINS A BALD CONCLUSIONS.

Judge Byrne found that the petition contained bald conclusions. The Order from which the appeal is taken states,

> "The petitioner has now filed an amended petition but he still does not allege any facts. . . ."

At the time of appellant's direct appeal this Court found that the prosecution had no duty to produce the "7-Up Man" [Wagner, supra, at 351]. Presently appellant claims that the evidence was "suppressed". He claims the witness was hidden from Wagner, and therefore, he had no access to the man - contrary to what this Court earlier found.

Conclusory allegations do not require the holding of a hearing. Sanders v. United States, 371 U.S. 1, 19 (1963). Appellant has refused to allege basic facts in support of his allegations.

B. APPELLANT IS FORECLOSED FROM LITIGATING GROUNDS WHICH HAVE HERETOFORE BEEN ADJUDICATED.

The ground urged in the instant proceeding was raised in the direct appeal from appellant's conviction. That ground is the

government's non-production of the "7-up man". Appellant now claims the witness was suppressed. Appellant is alleging an identical ground supported by a different legal argument which, clearly, is not permitted under a Section 2255 motion. Sanders, supra.

The April 21 order of the trial court [C. T. 15] permitted appellant an opportunity to allege that it was not the "7-Up man" to whom appellant was referring in the instant proceeding. Said opportunity was met with a refusal to state the name or identity of the witness [C. T. Supplemental]. When appellant refused to state the required information, Judge Byrne's finding at page 2, lines 11-19, of the May 23 order [C. T. 17-18] is the only reasonable finding. Appellant is simply attempting to re-litigate the "7-Up man".

In any event, when a second motion to vacate is brought, the trial court has discretion to deny relief as to those allegations which could have been, but were not, raised in earlier proceedings unless the petitioner alleges some justifiable reason why he was unable to do so previously. Williams v. United States, 197 F. Supp. 198 (D. C. Ore. 1961).

C. THERE WAS NO EX PARTE HEARING IN THIS MATTER.

Appellant claims, without citing proof, that there was an ex parte hearing by the District Court. Not only is there no proof of such a hearing, but there was no hearing.

D. APPELLANT'S MOTION WAS DECIDED BY THE CORRECT JUDGE.

Appellant complains about the judge who entertained the instant motion. Title 28, U.S.C., Section 2255 provides that the motion shall be made in "the court which imposed the sentence . . . ."

Appellant refers to the case of Halliday v. United States, 380 F.2d 270 (1st Cir. 1967), as requiring the disqualification of Judge Byrne in the instant matter. In Halliday, the First Circuit held that where the challenge was made to a prior determination of a judge as to the voluntariness of a plea, then the judge accepting the plea should be disqualified from hearing the §2255 motion. The First Circuit, at 273, stated that the plea judge should not be the trier of fact of "his own credibility". There is no parallel in the instant matter.

CONCLUSION

For the above reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Ronald S. Morrow
RONALD S. MORROW